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ore should be determined by certain named agents of the buyer and seller, but failed to provide for the contingency of their disagreement, and hence evidence of the quality of the ore was admissible before the jury.

3. INSTRUCTIONS—*Refusal when point covered by other instructions given.* It is not error to refuse to give an instruction when substantially the same ground is covered by another instruction which is given.

4. DAMAGES—*Breach of contract—Delay—Absence of fraud.* Actual fraud is not an essential ingredient of the breach of a contract. If there has been unnecessary and unreasonable delay in the performance of a contract resulting in damages to the plaintiff, he may recover such damages though the defendant be guilty of no deception or fraud.

5. DAMAGES—*Breach of contract—Delay in permitting performance—Profits.* A plaintiff may recover damages sustained by him for loss resulting from unreasonable delay on the part of the defendant in permitting him to perform his contract, and when he has been prevented by the defendant from completely performing his contract, he may also recover the profit he would have realized if he had been permitted to perform it fully. This is not a double recovery. The object of the law in awarding damages is to make amends or reparation by putting the party injured in the same position, as far as money can do it, as he would have been in if the contract had been performed.

6. BREACH OF CONTRACT TO ACCEPT AND PAY FOR CRUDE ORE—*Measure of damages.* Upon the breach of a contract to accept and pay an agreed price for crude ore, the measure of the plaintiff's recovery is the difference between the cost of the ore to the plaintiff at the stipulated place of delivery and the price the defendant agreed to pay for it. It is immaterial at what price the plaintiff may have sold the ore to other parties.

7. ARGUMENT OF COUNSEL AGAINST OPINION OF THE COURT. When the trial court has refused to give an instruction embodying a particular view of the case, it is not error to refuse to permit counsel to argue the same view before the jury.

8. APPEAL AND ERROR.—*Verdicts—Evidence to support.* This court will not set aside the verdict of a jury and the judgment of the trial court thereon as contrary to the evidence, where it appears that there was evidence before the jury upon which to base the verdict.

NORFOLK & WESTERN RAILWAY CO. v. GRAHAM.—Decided at Richmond, November 7, 1898.—*Keith, P. Absent, Riely and Cardwell, JJ.*

1. MASTER AND SERVANT—*Injury to servant—Obvious dangers—Fellow-servants.* A master is not liable for an injury inflicted on an experienced servant in the possession of all of his faculties, where it appears that the immediate cause of the injury was his exposure of himself to an open and obvious danger and the failure of a fellow-servant to give him timely warning, and that the duties which he was performing were too simple to require the publication of rules to govern them, and his fellow-servants were entirely competent to discharge the duties assigned to them.

2. RAILROADS—*Rules.* It is the duty of a railroad company to prescribe proper rules for the conduct of its affairs, but it is impossible to formulate rules to

govern its employees in the performance of every simple service they may be called on to discharge. Something must be left to the care and discretion of the employees themselves.

PENNYBACKER V. MAUPIN AND OTHERS.—Decided at Richmond, November 17, 1898.—*Harrison, J.* Absent, *Riely and Cardwell, JJ.*

1. **SPECIFIC PERFORMANCE**—*Terms on which granted*—*Case in judgment.* Every application for the specific performance of a contract is addressed to the sound judicial discretion of the court regulated by established principles. The contract must be distinctly proved, and its material terms clearly ascertained. It must be reasonable, certain, legal, mutual, based upon a valuable consideration, and the party seeking performance must not have been backward in enforcing his rights, but ready, desirous, prompt and eager. In the case in judgment the contract is not proved to the satisfaction of the court, there has been long delay in seeking its enforcement, and the claim asserted is barred by the statute of limitation.

MONGER V. ROCKINGHAM HOME MUTUAL FIRE INS. CO.—Decided at Richmond, November 17, 1898.—*Keith, P.* Absent, *Cardwell and Riely, JJ.*

1. **MUTUAL FIRE INSURANCE**—*Case at bar*—*Membership*—*Assessments.* The plaintiff became a member of the defendant company by an original certificate of membership issued to her in pursuance of the constitution of the defendant company, and having paid all assessments made against her, is, under the evidence in the case, entitled to recover for the loss sustained by her under the contract of insurance made with her. As assessments for losses are merely personal debts and not liens on the property, under the terms of the constitution of the defendant company, she is not liable for prior assessments made against her father under a certificate of membership held by him, as she does not claim under or in privity with him, but under certificate as an original member of the company.

2. **INSURANCE**—*Failure to pay assessments*—*Forfeiture*—*Waiver.* Where a forfeiture of an insurance policy for non-payment of assessments is relied on, the fact that subsequent assessments are made and received by the company, without making any reference to the non-payment of the prior assessment, is evidence tending to show a waiver of the forfeiture, and should be submitted to the jury under proper instructions. When the right to rely upon a forfeiture has been once waived it is extinguished and cannot be revived.

RORER AND OTHERS V. FERGUSON AND OTHERS.—Decided at Richmond, November 17, 1898.—*Keith, P.* Absent, *Riely and Cardwell, JJ.*

1. **SUBROGATION**—*Payment of judgment by sureties in a forthcoming bond.* A surety in a forfeited forthcoming bond who has paid the debt is entitled to be substituted to all the rights of the creditor against the principal debtor subsisting at the time he became surety, and to recover of him the full amount of the original judgment of the creditor against him.

2. **MERGER**—*Purchase of land by one holding a lien thereon*—*Other encumbrances.* The acquisition of the legal title to land on which one holds a lien does not necessarily merge the lien. It is a question of intention. In the absence of an express